



DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

Douglas M. Duncan  
*County Executive*

Elizabeth B. Davison  
*Director*

November 4, 1996

Roy Kelly, President  
Laytonia Homeowners Association  
c/o Metropolis  
4307 Gallatin Street  
Hyattsville, MD 20781-2051

Re: Case No. 323-G

Dear Mr. Kelly:

The date of issue of this decision is November 4, 1996.

Sincerely,

Sharon Wilder  
Investigator

SBW



DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

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November 4, 1996

Hassan Hajjar-Nejad  
Tysons Oriental Rugs  
P.O. Box 10391  
McLean, VA 22102-8391

Re: Case No. 323-G

Dear Mr. Hajjar-Nejad:

The date of issue of this decision is November 4, 1996.

Sincerely,

Sharon Wilder  
Investigator

SBW

**BEFORE THE MONTGOMERY COUNTY  
COMMISSION ON COMMON OWNERSHIP COMMUNITIES**

**In the Matter of:**

Laytonia Homeowners Association  
c/o Metropolis  
4307 Gallatin Street  
Hyattsville, Maryland 20781-2051,

Complainant,

v.

Hassan Hajjar-Nejad  
7507 Laytonia Drive  
Gaithersburg, Maryland 20877,

Respondent.

**Case No. 323-G**

MONTGOMERY COUNTY  
CLERK OF COURTS  
NOV - 4 1996

Received

***DECISION AND ORDER***

The above-entitled case, having come before the Commission on Common Ownership Communities for Montgomery County, Maryland for hearing on September 18, 1996, pursuant to Sections 10B-5(I), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended, and the duly appointed hearing panel having considered the testimony and evidence of record, finds, determines, and orders as follows:

***BACKGROUND***

On November 30, 1996, the Board of Directors of Laytonia Homeowners Association ("Board" or "Association") filed a formal dispute with the Montgomery County Office of Common Ownership Communities. The Association alleges that Hassan Hajjar-Nejad ("Nejad"), owner of 7507 Laytonia Drive, Gaithersburg, Maryland, improperly installed a fence without submitting an application to the Association's Architectural Control Committee, and improperly placed said fence on Association property. The Association argues that the utility of the common area is not an issue in the Board's domain, and that it is the Board's responsibility to ensure the common areas are available to all 139 owners.

Nejad's position is that he should not be prevented from installing a fence in view of vandalism occurring in the neighborhood, and that the issuance of a building permit from Montgomery County for installing the fence -- which he alleges is in the same location as a former fence -- was sufficient for him to proceed with its installation. Nejad argues that in view of the alleged placement of his fence at the time of the purchase of his home in 1985, and the alleged prior Board approval of his reconstruction of this fence in 1987, the principles of equitable estoppel prevent the Association from now arguing that he must remove or reinstall his fence -- essentially, "too little,

too late". Indeed, also arguing that he is entitled to retain his fence in its present location, Nejad argues that such entitlement is derived from rights obtained through adverse possession of the common property -- the portion of which the Association alleges is enclosed by Nejad's fence is not usable, anyway.

As the matter was not resolvable through mediation, the dispute was presented to the Commission for action pursuant to Section 10B-11(e) of the Montgomery County Code, 1994, as amended and, on August 7, 1996, the Commission voted that this was a matter within its jurisdiction. A hearing was held on September 18, 1996. The Association was represented by its property manager, Smita Pai, of Metropolis Management, as well as by its President, Roy Kelley, and Vice President and Chair of the Association's Architectural Control Committee ("ACC"), Benny Moore. Mr. Hajjar-Nejad was represented by Mallon A. Snyder, Esquire.

### ***FINDING OF FACTS***

1. In or about 1985, Nejad purchased a home at 7507 Laytonia Drive, within the Association. At the time of the 1985 purchase, a fence surrounded the 7507 Laytonia Drive address. Nejad claims that in 1987, he sought to rebuild the original fence, and applied for permission to do so from the Association through its ACC Committee, and received such permission from someone he identified as "Mary". However, neither Nejad, nor the Association, were able to provide copies of any documentation relating to the purported 1987 grant of permission.<sup>1</sup> Nejad claims that he rebuilt his fence in 1987 in the same location as had been previously. See Respondent's Exhibit 11.

2. Nejad claims that as a result of damage to his home, he temporarily moved out in early 1995, while repairs were being made. During this time, he further claims that periodic inspections of the home disclosed vandalism to the property, including destruction of portions of his fence. As a result of the fence damage, he decided to replace it again. A permit approving construction of a fence was issued by the Montgomery County Department of Environmental Protection on May 8, 1995.

3. The Association testified that in May 1995, the Board directed Metropolis management to write to Nejad regarding the newly installed fence at 7507 Laytonia Drive. On or about May 11, 1995, Gregory W. Shoemaker, a "Field Coordinator" with Metropolis, the management agent for the Association, wrote to Nejad requesting him to complete an "ACC application" for the fence which, at that time, was being installed at the 7507 Laytonia Drive address, and to provide proof that the fence was being installed on his property. The May 11, 1995 letter requested completion of this action prior to a "secondary walk-thru" of the property scheduled for June 5, 1995. The Association claims this letter was mailed by first-class mail; Nejad claims he never received this letter.

4. The Association testified that in June 1995, the Board directed Metropolis management again to write to Nejad. On or about June 13, 1995, Mr. Shoemaker sent another letter to Nejad, advising him that he was in violation of "section 4 ACC guidelines" [sic], of the

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<sup>1</sup>Nejad indicated that his records of the 1987 permission are with other business records in a warehouse in Northern Virginia, which currently are locked up outside of his custody.

Declaration of Covenants, Conditions & Restrictions ("CCRs") of the Association, and requesting that Nejad "make every effort to resolve" the matter within thirty (30) days, in the absence of which the Association Board would hold a hearing and take action as permitted pursuant to the Association's documents. The Association claims this letter was mailed by certified letter, and by first-class mail; Nejad claims he never received this letter.

5. The Association testified that in July 1995, it directed Metropolis management to telephone Nejad to be present at the Board's scheduled hearing in August regarding the fence issue. On or about July 10, 1995, Mr. Shoemaker sent Nejad another letter, advising Nejad that he was in violation of Article IX of the Association Bylaws, and relying on Article V of the Association's CCRs. Advising Nejad that the deadline for resolving "this matter" had passed, this letter provided notice that a hearing before the Board of Directors was scheduled for August 7, 1995 at 7:00 p.m. in the Association's community center. Nejad was requested to attend the hearing, produce any statement, evidence, and witnesses on his behalf. In the event Nejad was unable to attend the hearing, he was requested to advise Metropolis by July 25, 1995.

6. On or about August 7, 1995, the Board of Directors of the Association met.<sup>2</sup> At pages 2-3, the minutes relate to specific action items. With respect to the issues relating to Nejad and the previous correspondence on behalf of the Association by Metropolis, the minutes read:

#35258 37507 Registered and first class letter sent reg. approval of fence and providing proof that the fence is not on community property. No response as of yet from owner.

The minutes do not reflect that the Board reached any conclusion regarding Nejad, although Mr. Kelly and Ms. Pai both testified that the Board, in fact, did determine that a continuing violation by Nejad existed, and that appropriate action should be pursued. Mr. Kelly and Ms. Pai also testified Nejad was not present at the meeting, and that no effort was made to communicate the Board's decision at the August 7, 1995 meeting to Nejad.

7. In a letter dated August 22, 1995, Mr. Shoemaker wrote to Mike Denny of the Montgomery County Office of Common Ownership Communities ("OCOC"), requesting assistance from the OCOC in resolving the Association's dispute with Nejad.

8. On November 30, 1995, the Association formally submitted a Complaint Form to the OCOC. The issue identified by the Association related to the authority of a governing body, under any law or association document, to alter or add to a common area or element. The Association claimed its governing documents provide a procedure or remedy for resolving the dispute; that the Association made a good faith attempt to exhaust all procedures or remedies provided in the community documents; and that it had been at least sixty (60) days since the Association initiated the procedure or remedy provided for in the community documents. Specifically, the Complaint alleged (1) a fence was installed around the unit, (2) no request form was sent to the Association's ACC, and (3) the fence was placed on Association property; and sought removal of the fence.

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<sup>2</sup>The minutes for this meeting do not specify the exact date of the meeting, identifying them only as minutes for the Laytonia Board Meeting for August 1995.

9. At the September 18, 1996 hearing, the parties agreed to stipulate that there was no objection to the actual design or style of the fence installed by Nejad -- a "board on board" slat style. Accordingly, the only issues remaining to be decided were (1) whether the fence enclosed a portion of the Association's common area; and, if so, (2) whether the fence must be removed, or at least moved to within the bounds of Nejad's property line.

10. The Association's witness, Roy Kelley, testified that he has been President of the Association for three (3) years. Mr. Kelley testified that the fence installed in 1995 was outside of the pre-existing fence at 7507 Laytonia Drive; specifically, the back and side of the fence now lay on the Association's common property.

11. Benny Moore, on behalf of the Association, testified that he currently is its Vice President, and has been chair of its ACC since April 1995. Mr. Moore submitted a copy of a subdivision plat, which he used to determine the metes and bounds of Nejad's property lines<sup>3</sup>. Mr. Moore testified that he has made similar boundary line determinations for fence placements for other Association residents. Mr. Moore also testified that he asked Nejad for a copy of the property survey for 7507 Laytonia Drive obtained at the original purchase settlement, however, none was provided. Accordingly, Mr. Moore testified that the ACC recommended to the Board that the fence be moved, and the affected common property be repaired or restored to its original state.

12. Under cross-examination, Mr. Moore testified the Association had four other "fence" violations: complaints were sent to two (2) owners, and to one (1) real estate professional; Nejad's case was the first violation they have sought to enforce by legal means. Mr. Moore testified he was not involved with the Association's ACC at the time Nejad's earlier fence was installed. With respect to Nejad's fence, Mr. Moore testified that the fence lay on an area of common property which is used as a walkway, and to provide access to other owners; it also is the subject of a public utility easement. He was unable to testify on personal knowledge regarding the issue of vandalism alleged by Nejad, or with respect to any other fences on the 7507 Laytonia Drive address.

13. In his own testimony, Nejad relied on and submitted photographs of his fence as installed in 1995, including how the fence was built around several trees; the testimony was not clear whether the trees around which the fence was built were on Nejad's property, or on the Association's property. He also submitted photographs of other fences installed by other homeowners in the Association in support of his testimony that the Association was not uniformly enforcing its architectural control guidelines.

14. As part of Nejad's case-in-chief, his son testified that he and another person installed Nejad's fence in 1995, placing it in exactly the same place as the previous fence, in some cases, having to first break up the original concrete footings for the fence posts.

15. Nejad claims he received none of the correspondence from Metropolis on behalf of the Association prior to the August 1995 Board meeting. Although Nejad is not currently residing at the 7507 Laytonia Drive address, he testified that he regularly checks his mail, which is delivered to a

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<sup>3</sup>Nejad raised, and maintained, a continuing objection to any testimony by the Association regarding the credibility of any determination of specific property boundary lines in the absence of appropriate expert testimony, and documentation supported by same.

centrally-located mailbox on Association property. In this regard, Nejad further testified that his mailbox was frequently vandalized, and at times the Post Office also failed to deliver his mail. Mr. Nejad testified that the Association has been provided with his temporary address on Springhill Road in McLean, Virginia, although the Commission's attempts to deliver mail to Nejad at the Springhill Road address in McLean also were unsuccessful.

### ***CONCLUSIONS OF LAW***

Article II, Section 1 of the Association's Declaration states that every "Owner shall have a right and easement of enjoyment in and to the Common Area A which shall be appurtenant to and shall pass with the title to every Lot"; Section 4 defines "Common Area A" as "all real property owned by the Association for the common use and enjoyment of the owners except the parking area for the use of Owners of Lots".

Article V of the Association's Declaration provides for its architectural control:

No building, fence, wall or other structure shall be commenced, erected or maintained upon the Properties, nor shall any exterior addition to or change or alteration therein be made until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Board of Directors of the Association, or by an architectural committee ...

Article V, Section 1 of the Association's Bylaws delegates to its ACC the responsibility for carrying out the requirements of Article V of the Declaration.

Article IX, Section 3 of the Association's Declaration requires the approval of not less than seventy-five percent (75%) of the Lot Owners for any amendments.

Several versions of Association's Architectural Guidelines have issued<sup>4</sup>, and were filed in the Montgomery County, Maryland Land Records on December 30, 1988. The most recent of these guidelines, issued July 1978, specifically included fences newly constructed or reconstructed after July, 1978. In the event of violations, the July 1978 Guidelines directed the ACC to determine that a violation of these guidelines exists, and issue the affected homeowner a written statement detailing the nature of the violation. If the homeowner does not rectify the problem within 30 days, the committee will make a recommendation to the board of directors for further action as appropriate to the individual case. Earlier versions of the Association's guidelines provided for a separate hearing process for the homeowner before the ACC; this procedure no longer appears to be available for Association homeowners. To appeal ACC rulings, homeowners are told they "should" attend the next scheduled meeting of the Committee to express their views for reconsideration. If, after doing so, homeowners are still not satisfied, they "should" take their complaint directly to the Board of Directors at their next meeting.

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<sup>4</sup>Guidelines dated February 1971, September 1974, March 1976, and July 1978.

Section 10B-9(b) of the Montgomery County Code, 1994, as amended, requires that a "party must not file a dispute with the Commission until the party makes a good faith attempt to exhaust all procedures or remedies provided in the association documents", although Section 10B-9(c) permits a party to "file a dispute with the Commission 60 days after any procedure or remedy provided in the association documents has been initiated before the association." Section 10B-9(d) of the Montgomery County Code, 1994, as amended, requires that:

After a community association finds that a dispute exists, the association must notify the other parties of their rights to file the dispute with the Commission. The association must not take any action to enforce or implement its decision for 14 days after it notifies the other parties of their rights.

The Association has not followed either their own internal procedures, or Section 10B-9 of the Montgomery County Code. Even assuming the Association delegated the ACC responsibility for notifying the homeowner allegedly in violation of its documents, and even if he had received such notice, Nejad was not advised in the May 11, 1995 letter from Metropolis that he had thirty (30) days to correct the violation, only that another "walk-thru" would occur on or before June 5, 1995. At no time -- either in the May 11, 1995 letter, nor in the June 13, 1995, or July 10, 1995 letters from Metropolis, was Nejad ever advised that he might appear before the *Architectural Control Committee* to discuss his alleged violation, or when the ACC would next be meeting<sup>5</sup>, only that he should contact Mr. Shoemaker at Metropolis<sup>6</sup>. Yet, in filing its Complaint with the OCOC, the Association asserted it had made a good faith attempt to exhaust "all" procedures or remedies provided in the community documents.

Even if the Association's documents did not provide for a hearing process before its ACC, the Association failed to follow Section 10B-9(d) of the Montgomery County Code. Granted, it appears that Nejad may not have received any of the formal communications from Metropolis. Nonetheless, by failing to follow the required outline for seeking dispute resolution through the OCOC, it was premature for the Association to bring this action. Yet, in view of the nature of the Association's

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<sup>5</sup>Section 11B-111 of the Annotated Code of Maryland, entitled "Meetings of homeowners association or its governing body" states:

Except as provided in this title, and notwithstanding anything contained in any of the documents of the homeowners association:

(1) Subject to the provisions of paragraph (3) of this section, all meetings of the homeowners association, including meetings of the board of directors or other governing body of the homeowners association *or a committee* of the homeowners association, shall be open to all members of the homeowners association or their agents;

(2) All members of the homeowners association shall be given reasonable notice of all regularly scheduled open meetings of the homeowners association; ...

Paragraph (3) of Section 10B-111 provides the exceptions to the open meeting rule, none of which would apply to Nejad's alleged architectural control violations.

<sup>6</sup>The Association testified that the *Board* directed management in May 1995, to send an initial letter to Nejad; in June 1995, to send a further letter to Nejad; and in July 1995, to *telephone* Nejad to request that he attend a hearing scheduled before the *Board* in August 1995. There was no evidence or other testimony presented that management attempted to telephone Nejad.



dispute with Nejad, were we simply to dismiss this action without prejudice, it is likely that the Association would simply begin anew, hopefully taking more caution to "cross their T's" and "dot their I's", and the Commission again would be asked again to hear the dispute.

Nejad's reliance on the theory of adverse possession as a basis for retaining his fence in its current state is misplaced. Elements of land occupation to support the argument that someone such as Nejad may acquire title by adverse possession require actions which are "actual", "open", "visible", "notorious" or "hostile", "exclusive", or a combination of these factors, all for a specific period of time, typically at least twenty years. Even if some of these factors might have been present, Nejad has not even owned his home at 7507 Laytonia Drive for more than about eleven years. Moreover, since this dispute involves, in part, a question over the actual boundaries for Nejad's property, the elements of actual, open and notorious (or hostile) are missing since Nejad believed the current and prior fences were on his property. In addition, for Nejad to have occupied common elements lands, as alleged by the Association, would otherwise have been in violation of the Association's governing documents. In an unpublished, but otherwise very analogous case, the Maryland Court of Special Appeals held that "[r]ules and regulations limiting the use of general common elements in the Condominium's by-laws must be applied in common to all co-owners and not exclusively benefit one or fewer than all co-owners". *Council of Co-Owners, Bucknell Common Condominium Horizontal Property Regime, et al. v. Dorothy Jane Dunnington* No. 86 (Md.Ct.Spec.App. 1992). (Court held vote by a majority of association's members to permit an owner to construct a fence adjacent to their unit, but on association's general common elements, to result in a wrongful denial of the rights of other owners to access, use and enjoy the association's general common elements.)

We also do not believe that the Association is prevented from enforcing its governing documents under the theory of equitable estoppel. Article IX, Section 1 of the Association's Declaration states that: "Failure by the Association or by any Owner to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter." In any event, "[e]quitable estoppel is the inhibition to assert such right by reason of mischief following one's own fault and may arise even though there was no intention on the part of the party estopped to relinquish or change any existing right. Prejudice to the other party is an essential element of equitable estoppel." *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 344, 415 S.E.2d 384 (S.C. 1992). Inasmuch as Nejad may not, in fact, own all the land on which his fence sits, some of which may be land owned in common with the members of the Association, he cannot be prejudiced, since a requirement to move the fence will not deprive him, or constitute a taking, of his land.

### **ORDER**

In view of the foregoing, and based on the evidence of record, it is hereby ORDERED that:

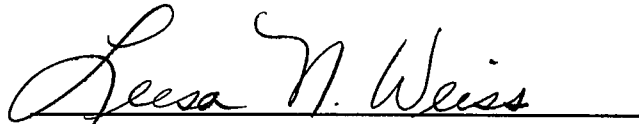
1. Within two (2) weeks of the issuance of this Order, the Association shall schedule an independent survey to determine the metes and bounds of the property located at 7507 Laytonia Drive, Gaithersburg, Maryland, said survey to be completed within four (4) weeks of the issuance of this Order, and to be paid for by the Association. Said survey may not be conducted by any person or firm having any ownership interest in any property within the Laytonia Homeowners Association, or anyone having any family relationship with anyone having any ownership interest in any property within the Association.

2. In the event the ordered survey discloses that Nejad's fence is completely within the boundaries of his property, no further action on Nejad's part will be required.

3. In the event the ordered survey discloses that Nejad's fence is outside of the boundaries of his property, either on Association common elements, or on another owner's property, Nejad shall have the fence moved, at his sole expense, to within the boundaries of his property line, to be completed not later than April 1, 1997. In the event Nejad must move his fence, he shall obtain the appropriate Montgomery County permits to do so prior to any relocation effort; and he shall obtain written approval from the Association, said written approval not to be unreasonably withheld.

The foregoing was concurred in by panel members Huson, Wilson, and Weiss.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.

A handwritten signature in cursive script, reading "Leesa N. Weiss", written over a horizontal line.

Leesa N. Weiss  
Panel Chairperson  
Commission on Common Ownership Communities